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No. _____

In The

Supreme Court of the United States

ROBERT A. BIEBER,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Federal Circuit err in affirming the decision of the Merit System Protection Board refusing to review the unfavorable ruling of the administrative law judge by applying an incorrect standard for determining bias in a judge-tried case, such that the Court of Appeals erroneously found lack of bias sufficient to satisfy the mandate of due process?

2. Was the trial court's decision impermissibly tainted by prejudice, such that his credibility determinations should not be accorded the deference usually given to trial judges on such issues?

3. Did the Circuit court apply the correct standard in deciding whether trial court's decision to uphold the petitioner's termination clearly erroneous, such that reversal is required on the merits?

STATEMENT OF PARTIES

The parties to this cause are Robert A. Bieber and the United States Department of the Army. Neither party has either parent companies or wholly owned subsidiaries.

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CITATIONS TO LOWER COURT AND AGENCY OPINIONS

The Merit Systems Protection Board's decision to deny the petitioner's request for review of the Administrative Law Judge's decision was entered on 13 September 2000.

The Ninth Circuit Court of Appeals judgment affirming the MSPB's decision was entered on 02 May 2002. Rehearing *en banc* was denied on 10 July 2002, and the mandate issued on 17 July 2002. The opinion is reported at 287 F.3d 1358.

JURISDICTIONAL STATEMENT

Jurisdiction for the Merit Systems Protection Board is found in 5 U.S.C. § 1204.

Jurisdiction for the United States Court of Appeals for the Federal Circuit arose under 28 U.S.C. § 1295(9).

Jurisdiction of this Court arises under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment V, Due Process Clause

5 U.S.C. §§ 7511(a); 7512(1); 7513(d); 7701(a) and 7703

STATEMENT OF THE CASE

Certiorari is sought relative to the appeal of Robert A. Bieber from an unfavorable review by the Merit Systems Protection Board of an agency determination that his civil position with the United States Department of the Army should be terminated. The petitioner (hereinafter "Bieber" or "petitioner") filed a timely appeal to the United States Court of Appeals for the Federal Circuit from the final decision of the Merit Systems Protection Board, in which review was denied and the initial decision of the administrative judge was upheld. That initial decision, made final by the denial of review, affirmed the petitioner's removal from service as determined by the Department of the Army pursuant to 5 U.S.C. §§ 7511(a)(1)(A), 7512(1), 7513(d), and 7701(a).

The petitioner sought judicial review of the decision of the Merit Systems Protection Board (MSPB) as being arbitrary, capricious, not founded in law, and not effecting a penalty in the good of the service. The petitioner also complained that he did not receive a fair hearing before the administrative law judge of the Merit Systems Protection Board, in that the record reflects many instances of bias by the judge so that the judge's determination was tainted. Finally, the petitioner asserted that removal was not proper, given his length of service, the unique circumstances of the case, and the fact that, prior to the outset of these circumstances, the petitioner had an excellent Record of Service.

Jurisdiction in the Court of Appeals was proper under 5 U.S.C. § 7703 (2001), which provides that appeals of a final decision of the Merit System Protection Board shall be filed in the U.S. Court of Appeals for the Federal

Circuit, and the case involved review on the merits of the action by the respondent agency.

Bieber was a long-term employee of the Department of the Army with an outstanding service record in which he was accorded high praise for loyalty and integrity. Prior to the disciplinary proceeding that gave rise to the petitioner's removal, the petitioner had only a letter of reprimand and a suspension on his record. He was ostensibly terminated on account of an e-mail sent to his supervisor and copied, but not primarily addressed, to other agency employees on 02 May 1999, sent two weeks after an arbitration hearing regarding the petitioner's suspension.

It is difficult to separate the discrete actions in which Bieber was involved, and also to distinguish between actual and pretensive motivations by the Department of the Army. As an example, the instant action was ostensibly predicated upon a May 02nd, 1999 e-mail. However, no action was taken for several weeks after May 02nd, and, in reality, no action was pursued until Bieber received the final decision in an unrelated arbitration which he read outloud to colleagues. In a 26 May 1999 memorandum, direct supervisor Tom Rezentes voiced his displeasure with Bieber for having read that decision outloud, though all parties to *this* proceeding acknowledge that Bieber had a lawful right to do so. No action involving the May 02nd e-mail was contemplated until Bieber incurred his direct supervisor's displeasure by the lawful conduct of reading the arbitration decision outloud, after which, apparently unable to discipline Bieber for lawful conduct, Rezentes decided to punish him for the May 02nd e-mail, despite the fact that no one had cautioned him for having written it and in fact, the head of the Directorate had responded to it

without any mention that it was considered the subject of potential disciplinary action.

In any event, after the sending of the May 02nd e-mail, Bieber was charged with insubordination, failure to obey management directive, disrupting the workplace, and making a false statement. The charges of failure to obey management directive/disruption of the workplace arose out of the petitioner's contact with fellow employees of the agency regarding the subject matter of the May 02nd e-mail, to wit, the request by Bieber for clarification of appropriate work attire.

Bieber's *initial* request for direction from his supervisors regarding appropriate work attire had ostensibly been answered with an undated memo generated after an 18 September meeting, which memo was received by Bieber on 29 September 1998,[1] that the official position was that such items were "not appropriate but permitted", after which he took no further action regarding the issue of work attire. Notably, Bieber had never asked or cared what was "tolerated"; his concern was with what was *appropriate*. Only the administrative law judge in this case attached any significance to the degree to which supervisory personnel would "tolerate" nonetheless inappropriate attire in the workplace. Bieber himself only wanted to know what was considered *appropriate* workplace attire by the supervisors in his workplace.

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[1] The agency's record erroneously references this memorandum as being dated 18 September 1998. It was undated, and was received by Bieber on 29 September 1998. It will be hereinafter referenced as the "29 September 1998 memo".

In late Fall of 1998, Bieber initiated an unrelated grievance proceeding arising out of interaction between himself and supervisory employees that culminated in his suspension. The subsequent arbitration hearing had nothing whatsoever to do with appropriate attire in the workplace, but only with the interaction between Bieber and his supervisor.

As noted, the grievance procedure[2] regarding Bieber's alleged misconduct with respect to his supervisors was unrelated to the separate issue of "appropriate workplace attire" was officially addressed in the 29 September 1998 memo. Bieber accepted that memo as being the official agency position. After his receipt of that memo, until 02 May 1999, Bieber took no action regarding work attire, did not speak to anyone regarding work attire, and accepted the September 29th guidance. Bieber had no discussions with anyone in the workplace about the subject between 29 September 1998 and 02 May 1999, and *no incidents occurred in the workplace.*

However, on 20 April 1999 during the arbitration hearing, Bieber learned for the first time that his direct supervisor, Tom Rezentes, had drafted a Memorandum For Record dated 23 April 1998, in which a different position regarding work attire than that conveyed to him on 29 September 1998 was taken. At same hearing, Ray Lowery

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[2] That grievance procedure was unrelated to the events giving rise to the instant case. For clarification, it can be noted that the original grievance in that case was filed on 30 September 1998; the second step proceeding was initiated on 01 October 1998; commander decision rendered on 14 December 1998; and the arbitration was filed on 12 January 1999.

and Tom Rezentes (Bieber's second line and first line supervisors, respectively) contradicted each other in their testimony on point. The introduction of the year-old and previously secret MFR regarding appropriate work attire raised a legitimate question in Bieber's mind as to whether the official position was different than that stated in the 29 September 1998 memo.

The May 02nd e-mail was sent by Bieber after participation by him in that hearing, in which he saw the year-old MFR for the first time. He could not understand why, if the memorandum had existed between 23 April 1998 and 20 April 1999, his supervisor had not just given him or his union representatives a copy of that MFR so that Bieber's question about the position of management regarding work attire would be answered. The memorandum dated 23 April 1998, written by his direct supervisor, Tom Rezentes, clearly stated that the types of clothing about which Bieber had inquired were "acceptable", which was consistent with the testimony of his supervisor, Ray Lowery, at arbitration hearing, and consistent with his own testimony before the MSPB, but *inconsistent* with the September 29th guidance given to Bieber that such clothing was "inappropriate but permitted". This was also in contradiction to Rezentes' own testimony at the arbitration hearing.

The distinction between the testimony of Tom Rezentes, Bieber's supervisor, at the unrelated arbitration hearing and his later testimony at the MSPB hearing involved in this case is crucial. At the arbitration hearing, the agency had obfuscated the matter at hand by raising the tangential issue of "appropriate" attire in the workplace, despite the fact that "appropriate attire" was not at issue in the arbitration. Rezentes testified that the attire

about which Bieber had sought an official position was "inappropriate". Two other supervisory witnesses testified that the attire was "appropriate", and the agency brought forth the memorandum calling the previously secret 23 April 1998 memorandum which contradicted Rezentes' own testimony and the 29 September 1998 memo.

Although the April 23 memo was irrelevant to the issues at the arbitration hearing, nonetheless, its use at the hearing did have the unexpected effect of its being shown to Bieber for the first time. Hence, in April of 1999, in the midst of an arbitration that had no relevance to "appropriate workplace attire", nonetheless Bieber learned, for the first time, that a memorandum had been created on 23 April 1998 which took a different position on appropriate workplace attire than that which he had been given in the 29 September 1998 memo. His need for clarification or restatement of the agency's position is understandable in light of both the conflicting memoranda and the conflicting testimony from the agency supervisors.

Bieber's testimony in *this* case before the administrative law judge made quite clear that he was shocked to learn of the 23 April 1998 memorandum. It contradicted the 29 September 1998 "official" position. It had been created but *withheld* from him. If that memorandum had been disclosed in the first or second steps of the "appropriate dress grievance" in September of 1998, the subsequent events might have been radically altered. Likewise, if either tier of supervisory personnel had disclosed the existence of the memorandum, and the decisions supposedly made, the events would have been different. However,

it was withheld, and the contradictory September 29th memorandum was generated.[3]

When the April 1998 MFR was then used as an exhibit in the arbitration proceedings in April of 1999, Bieber was understandably confused as to the official position regarding workplace attire. It was natural that a man who has the utmost respect and regard for honor, loyalty and service, should seek clarification or restatement of the official position on workplace attire, which is the front-line symbol of respect. Although the administrative law judge opined during these proceedings that "dress obviously has nothing to do with respect or anything like that", for Bieber, the attire worn in the workplace is a loud and visible symbol of the degree of respect held by those in the workplace for the office they hold and the country they serve. It is all about respect, as Bieber's testimony clearly establishes.

Bieber's May 02nd e-mail recited that its purpose was to obtain guidance on Appropriate Dress for MVR Branch members in the workplace. In the May 02nd e-mail, Bieber also asked for a response by a date certain after which he would initiate a grievance procedure. Bieber also explained that the reason for renewing his questions about the appropriateness of the identified articles of clothing

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[3] It is unclear why the April 23rd 1998 MFR was withheld from Bieber. It could have been disclosed at any time. Even Lowery testified at the hearing in the instant case that he did not know why Rezentes had not given it to Bieber. Both tiers of supervisory personnel had ample opportunity to disclose its existence.

was the discovery, for the first time, of the previously-concealed 23 April 1998 MFR and the contradictory testimony given.

Regarding the charge of making a false statement, the charge arose from language in the May 02nd e-mail to the effect that Bieber's supervisor, Mr. Rezentes, was a liar. Bieber and Rezentes contradicted one another in their testimony regarding whether Rezentes had made a particular statement or whether the statement, if made, was false.

The administrative law judge had before him a memorandum from Rezentes which makes crystal-clear that Rezentes never indicated to Bieber that Lowery was intending to get back with Bieber about appropriate dress attire, which was the lie that Bieber referenced in his May 02nd e-mail. The memorandum, written and disseminated by Rezentes, clearly states that *Rezentes prompted Lowery about replying to Bieber*, but never states – and indeed, could not state as it did not occur – that Rezentes told Bieber that Lowery intended to reply to Bieber's question. Hence, Rezentes' own words prove that he *did* lie about having told Bieber that Lowery would be contacting Bieber.

The petitioner steadfastly maintained that he had not committed any breach of his employment nor committed any wrong whatsoever. At no time during the proceedings did the petitioner consider any compromise that would do less than exonerate him, for the simple reason that he had complete faith that his conduct was at all times within his rights and exemplary.

Substantial questioning at the hearing related to why Bieber sent copies of the May 02nd e-mail to other

personnel. Bieber testified that he did so because he had been directed to maintain a personal, positive relationship with his co-workers, and that he thought to do so, he needed to keep them advised of what was happening. A psychologist who had examined Bieber and issued a report dated October of 1999, whose report came into evidence by stipulation, confirmed that Bieber posed no threat of violence and that his motivation was loyalty, honor and service.

After a full day of testimony, the hearing was adjourned. Closing arguments were submitted in writing, and the administrative law judge issued his opinion thereafter. A timely filed Petition for Review was denied by the Merit System Protection Board, thus making final the ALJ's initial decision. A timely filed appeal followed. A panel of the Federal Circuit Court of Appeals affirmed, and, thereafter, rehearing *en banc* was denied.

ARGUMENT

1. Did the Federal Circuit err in affirming the decision of the Merit System Protection Board refusing to review the unfavorable ruling of the administrative law judge by applying an incorrect standard for determining bias in a judge-tried case, such that the Court of Appeals erroneously found lack of bias sufficient to satisfy the mandate of due process?

Certiorari is proper to examine the extension of a prior decision of this Court to the issues raised by Bieber's appeal. The Court of Appeals, in overruling its own precedent, improperly extended the holding of *Liteky v. U.S.*, 510 U.S. 540 (1994) to the case at bar. Certiorari will serve

to clarify for the lower courts the proper standard to be applied to questions of due process and fundamental fairness in a judge trial, whether before the District Courts or before an administrative law judge in an agency hearing.

The administrative law judge presiding over the petitioner's case availed himself of every opportunity to degrade, harass and berate the petitioner and the petitioner's attorney. Compounding the trial court's repeated castigation of the petitioner was the judge's deft and relentless examination of witnesses in aid of the agency's case. Examples of all three pursuits by the administrative law judge were acknowledged by the Court of Appeals, which itself found many of the judge's comments to be improper.

Throughout the hearing, the administrative law judge improperly inserted himself into the proceedings. The transcript is replete with examples. The judge commented on the aimlessness of the petitioner's attorney; derided the client-control of the petitioner's trial counsel; scolded that attorney for "trying to prove the agency's case"; and expressed exasperation with petitioner. His bias was not limited to censorship of the petitioner and his counsel, however. The administrative law judge also aided in the agency's case by asking questions of agency witnesses to flesh out points in its favor; engaged in prospective conjecture about future conduct of the petitioner; and suggested answers to agency witnesses.

Tellingly, the administrative law judge flatly denied that the Department's personnel bulletins instructed employees to seek guidance from their supervisor regarding appropriate dress even after having that precise

directive read into the record from the personnel documents. Further, the ALJ reaffirmed his bias by including in his Initial Decision, the belief that "the appellant does not appear to understand that, absent health and safety considerations, what his fellow employees wore to work was truly none of his business". However, the same personnel documents dictate that "Employees are expected to comply with reasonable dress and grooming standards based on productivity, type of position occupied, health, safety and comfort", that "clothing worn by Ft. Leavenworth civilian employees will be in keeping with good taste and decorum", and that "Employees should seek guidance from their supervisor concerning attire appropriate in their workplace". This mandate makes the issue of appropriate clothing a matter of concern for all Fort Leavenworth civil employees, regardless of whether Judge Salyer agrees that it should be.

The leading case in the Federal Circuit relating to the demonstration of bias in a court-tried case, at least prior to the Circuit Court's decision in the case at bar, was *Grubka v. Dept. of Treasury*, 858 F.2d 1570 (Fed. Cir. 1988). *Grubka* controls in this case, in that no later case by the Federal Circuit or this Court has addressed the issue at bar. Accordingly, *Grubka's* principles should have been applied to determine if the petitioner received a fair hearing, and, had *Grubka* been applied, the Federal Circuit undoubtedly would have reversed the decision of the MSPB.

The appellate panel, ignored *Grubka's* holding and affirmed, looked to this Court's holding in *Liteky v. U.S.*, 510 U.S. 540 (1994). However, *Liteky* is inapposite. *Liteky* involved a Motion to Recuse made under the federal statute in a jury trial. The federal recusal statute, 28

U.S.C.S. § 445(a) requires that a federal judge disqualify himself in any proceeding in which his impartiality might reasonably be questioned. *Liteky, supra,* 114 S. Ct. at 1153. *Liteky* involved an examination of the "catchall" recusal provision in light of the prior "extra-judicial source doctrine" to determine whether that doctrine applies to Section 455(a) recusal motions. *Id.* at 1153-1154.

Liteky neither *changed* nor, indeed, *addressed* the standard for determining whether judicial bias abridged fundamental fairness. In commenting on disqualification under Section 455(a), this Court merely noted that "judicial remarks that are critical or disapproving of, or even hostile to, counsel, the parties or their cases, ordinarily do not support a bias or partiality challenge". 114 S. Ct. at 1157. This Court noted, in *dicta*, the types of comments that remain immune from disqualification. *Ibid.* However, that subject was not *at issue* in *Liteky*, and the dicta regarding it does not control the disposition of the case at bar.

Regardless of the *dicta* contained in the *Liteky* opinion, its holding was limited to the question for which *certiorari* was granted, to wit, "whether required recusal under [section 455(a) of Title 28 of the United States Code] is subject to the limitation that has come to be known as the 'extra-judicial source' doctrine". 114 S. Ct. at 1150. Moreover, *Liteky* involved a Motion to Disqualify the presiding judge in a jury trial, where the allegedly offensive comments were made during a prior judge trial over which that judge presided. *Id.* at 1150-1152.

In the case at bar, the trial judge whose pattern of commentary demonstrated bias was the factfinder in the very proceeding in which his bias is alleged to have

resulted in a constitutional infringement, to wit, denial of fundamental fairness. The precise question presented in the case at bar is different, to wit, whether a pattern of conduct by the administrative law judge who was also the final arbitrator of fact resulted in the denial of due process. Because of its pivotal factual and procedural differences, *Liteky* does not control the disposition of this case. Rather, *Grubka* controls in that *Grubka* addresses the requirements of fundamental fairness necessary to effect due process in a judge-tried case, whereas *Liteky* addresses the application of the federal recusal statute in a jury trial. *Liteky*, 510 U.S. at 541. *See, e.g., Rose v. Lundy*, 455 U.S. 509, 514 n. 5 (1982) (Supreme Court opinion not controlling on issues not before it).

The Federal Circuit relied on two cases in extending *Liteky* to this judge-tried case. One is *Logue v. Dore,* 103 F.3d 1040 (1st Cir. 1997). That case involved a jury trial where the alleged bias was attributed to the judge, as it was in *Liteky*. *Logue* is therefore not on all fours with the case at bar.

Here, the impermissible bias was on the part of the trier of fact. In *Liteky*, the impermissible bias was on the part of the *judge* in a jury trial; the difference is marked, in that bias on the part of the *fact-determining body* is alleged in the case at bar which is inapposite to *Liteky* and *Logue*. In fact, *Logue* is even more distinguishable from the case at bar, in that the remarks revealing bias on the part of the judge were made outside the presence of the jury. *Logue, supra,* 103 F.3d at 1046. The trier of fact had no exposure to the bias of the judge. By sharp contrast, in the case at bar the biased judge *was* the trier of fact. In *Logue*, the trial judge, who obviously disliked the plaintiff

before him, was careful to shield the jury from his remarks. *Ibid.*

The distinction between the case at bar and both *Logue* and *Liteky* is sufficient to prohibit the extension of the *Liteky* principles to it, absent a Supreme Court holding that explicitly extends the standards announced in *Liteky* to bench trials where the claim on appeal is that fundamental fairness was denied. This court has been both uniform and emphatic in its pronouncement that its decisions should be narrowly applied.

For example, in *Humphrey's Executor v. U.S.*, 295 U.S. 602, 626 (1935), this Court chastised the Court of Claims for reliance on a prior decision of this Court by reminding that "the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress". *Ibid.* While "in the course of the opinion of the court, expressions occur which tend to sustain the government's contention" nonetheless "these are beyond the point involved and, therefore, do not come within the rule of stare decisis". *Id., citing and quoting Cohens v. Virginia*, 6 Wheat. 264, 399 (1821), *citing in turn Marbury v. Madison*, 5 U.S. 137 (1803).

As noted by the majority in *Cohens v. Virginia*, *supra* at 290, Chief Justice Marshall, who delivered the opinion in the *Marbury* case, speaking again for the court in the *Cohens* case, said:

> It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the

> judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens, supra, 19 U.S. at 290.

Marshall added that the general expressions in *Marbury v. Madison* were to be understood with the limitations put upon them by the opinion in the *Cohens* case. See, also, *Carroll v. Lessee of Carroll*, 16 How. 275, 286-287 (1850); *O'Donoghue v. United States*, 289 U.S. 516, 550 (1933).

Because the reviewing panel of this Court applied an incorrect standard to determine whether due process had been accorded to the petitioner, rehearing is mandated. The *Grubka* standard should be applied to determine if the numerous statements of the administrative law judge render his decision indefensible by standards of fundamental fairness. Under the *Grubka* standard, the plethora of sarcastic and hostile comments by the administrative law judge, far in excess of the single comment made by the ALJ in *Grubka*, warrant reversal due to the constitutional infirmity of the decision to uphold the agency action.

The present case presents an issue of whether the petitioner received the fundamental fairness that is part and parcel of due process, while *Liteky* involved a review of the trial court's denial of a motion to recuse under the federal recusal statute. These are significant differences, as the D. C. Circuit recognized in *U.S. v. Donato*, 99 F.3d

426 (D. C. Cir. 1996), the other case cited by the Federal Circuit in its opinion in the case at bar.

Although *Donato* involved biased statements made by a judge in front of a jury, the claim of constitutional infirmity differed from that made in *Liteky* and parallels the claim made by the petitioner in the case at bar. "Donato's claim is different [than Liteky's]. She claims that the district judge displayed such bias against her and her attorney that she did not receive a fair trial". *Donato, supra at* 441. This was a significant distinction to the D. C. Circuit, which thus rejected the *Liteky* analysis, finding that the negative comments of the judge, in the hearing of the jury, were concentrated, frequent, critical, and surely had a detrimental effect on the jury's decision hence robbing Donato of a fundamentally fair proceeding. 99 F.3d at 435-437. Moreover, *Donato* recognized that *because this bias was displayed to the jury,* the "line was crossed" between fairness and an impermissible deprivation of due process. The Court was careful to acknowledge that the tainting of the trier of the fact was the constitutional downfall of the proceedings:

> The [comments of the judge about the defendant], combined with the *near-constant criticism of the defendant's counsel,* raise in us a serious doubt as to whether this defendant received a fair trial. We have no choice, therefore, but to reverse. . . .
>
> We wish to emphasize that we are working no dramatic change in the law of this Circuit. Trial judges have always had, and continue to have, a wide discretion. . . . That discretion has always been limited by the requirement that the defendant receive a fair trial. . . .

99 F.3d at 438 (italics supplied). Donato did not receive a fair trial just as Bieber did not. Had the Court of Appeals applied a standard paralleling the fundamental fairness analysis of *Donato* and *Grubka*, the judgment of the MSPB would have been reversed.

This case is closer on its facts to *Donato*. While the judge's bias permeated the trier of fact in *Donato*, with the trier of fact being the jury which heard the offending statements, the judge's bias in the case at bar is even more insidious because the judge *was* the trier of fact. Otherwise, the biased statements – constant disparagement of the defendant during his testimony, constant criticism of the defense attorney – parallel in number and degree those which undermined fundamental fairness and mandated to a reversal in *Donato*.

The standard for determining if fundamental fairness has been abridged by the conduct of an administrative law judge is a question of exceptional importance raised by this case and the panel's abandonment of the *Grubka* decision and extension of the *Liteky* holding. Accordingly, certiorari should be granted to resolve the issue of the governing standard and what precedent controls the determination of cases involving an allegation that due process has been denied in a court-tried proceeding based upon statements of the judge evidencing bias and hostility towards a party and his attorney.

2. Was the trial court's decision impermissibly tainted by prejudice, such that his credibility determinations should not be accorded the deference usually given to trial judges on such issues?

The second question presented for certiorari is an outgrowth of the first. This Court should grant certiorari to consider whether the bias of a trial court relieves the reviewing appellate court of the obligation to accord due deference to the trial court's credibility determinations. Even assuming *arguendo* that the level of bias was not sufficient to render the proceedings constitutionally infirm, but especially if it was, the conduct of the administrative law judge should have counter-balanced the normal deference accorded decisions which the trial judge is typically seen as better capable of making, since the trial judge's prejudice acts as a prism to distort his perception of the testifying witnesses.

In affirming the agency action as upheld by the administrative law judge, the Court of Appeals noted that the ALJ's decisions heavily relied on his credibility determinations. It is true that in the typical case, a judge presiding over the initial trial of the matter is thought to be uniquely qualified to make credibility determinations, since that judge can see the witness's body language and facial expressions, and hear their tone of voice. Rule 52(a), Fed. R. Civ. Proc.; *see, e.g., Anderson v. City of Bessemer, North Carolina,* 470 U.S. 564, 574-575, 105 S. Ct. 1504, 1511-1512 (1985).

The decisions of this Court, and, indeed, of the Courts of Appeals, underscore the sanctity of a trial court's findings whether credibility is an issue or "when the district court's findings do not rest on credibility determinations".

Anderson, supra, 470 U.S. at 574. What, then, justifies a finding that the trial court's determinations were clearly erroneous where, as here, those findings were based exclusively on credibility determinations?

This Court is the final voice on the issue of due process. Even in light of this Court's pronouncement of the parameters of the "clearly erroneous" standard, as set forth in *Anderson*, it cannot be gainsaid that fundamental fairness has been accorded a petitioner subjected to the level of derision and animosity acknowledged by the Federal Circuit in its review of the administrative law judge's conduct of the petitioner's hearing.

The administrative law judge's credibility decisions are not *entitled* to deference. No opinion of this Court upholds the proposition that "due deference" is tantamount to blind acceptance. The trial court is accorded due deference based upon a presumption that he is reviewing the witnesses with the eye of justice, not the lens of derision, hostility and anger.

The Court of Appeals acknowledged the impropriety of at least some of the comments made by Judge Salyer. The totality of those comments operates to dictate that *no* deference should have been accorded *any* of Judge Salyer's credibility findings, without which the agency's action against, and termination of, the petitioner could not be upheld.

Possibly because the Court of Appeals improperly applied the standard of *Liteky* rather than that of *Grubka*, the Court overlooked its prior precedent regarding the nexus between an administrative law judge's improper comments and his credibility findings. Where, as here, the comments "taint the [administrative judge's] decision on

credibility", reversal is warranted. *Grubka*, 858 F.2d at 1574. Rather than reverse, as it should have done, the appellate court deferred to the credibility determinations of the administrative law judge in affirming the Merit System Protection Board. That deference, failing as it does to follow *Grubka's* precedence to the contrary, creates an impermissible breach in fundamental fairness. While an unbiased judge might well be entitled to deference in his credibility findings, the overtly hostile judge deserves no such consideration.

The determination that the petitioner had engaged in insubordination and committed the other substantive offenses upon which termination was based is not supported by *direct* evidence. Rather, small stepping stones were connected by branches of credibility determination, in a hearing built primarily from contradictory and largely uncorroborated testimony. The resultant bridge intended to span from the presumption of innocence to the finding of guilt is not solid.

Moreover, Bieber's supervisor, Rezentes, contradicted himself by testifying at the earlier arbitration hearing (not relating to appropriate work attire) that the attire questioned by Bieber leading to the instant proceedings was "inappropriate", and testifying in these proceedings that the same attire was "appropriate". Although the earlier testimony was in a different proceeding, it was in evidence through Bieber's quote of him during his testimony before Judge Salyer and also by way of cross-examination. Clearly, a finding that Rezentes was credible is nearly *per se* suspect. In the instant case, the obvious bias of the very trial judge that found him credible is unquestionably established since Rezentes exposed himself by his own contradictory testimony.

In fact, the administrative law judge *acknowledged* the contradiction in Rezentes' statements, but dismissed the matter as being of no importance in his sidebar comments on the record to Bieber during these proceedings. That he did so is of double relevance: First, it establishes for the record that Rezentes contradicted himself and is hence *not* credible; and, second, it establishes the lengths to which the administrative law judge was willing to go in order to find *against* Bieber, demonstrating almost without dispute, the depth of his bias.

Where a factfinder engages in a pattern of conduct that includes the relentless issuance of opinions grounded in his prejudiced or emotional reaction to the litigant, any resultant decision is capricious and abusive. The administrative law judge rested his determination almost exclusively on a coin-toss credibility analysis, and his choice of which witnesses were credible is drenched in prejudice, as evidenced by his frequent and egregious badgering of the petitioner and his counsel.

Unquestionably, the petitioner is entitled to due process prior to being condemned by the loss of his employment; indeed, he is entitled to due process prior to suffering the loss of his reputation by the labels placed on him by the administrative law judge. As this Court has observed, "where the State attaches 'a badge of infamy' to [a] citizen, due process comes into play". *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 27 L.Ed. 2d 515 (1971). Quoting this Court's prior decision in *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Justice Frankfurter, concurring), the *Constantineau* court emphasized that "The right to be heard before being condemned to suffer grievous loss of any kind, even though

it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Ibid.*

The decision to terminate the petitioner was predicated upon his May 2nd e-mail. In affirming that decision, the administrative law judge grafted the May 2nd e-mail onto alleged conduct that occurred nine months, and, in some cases, two years, before that e-mail was sent. This slicing of time and events enhanced the agency's argument because it ignored the adjudication of an intervening grievance arbitration and the unexpected discovery of a previously suppressed Memorandum and conflicting testimony which provided contradictory information to the petitioner. The May 2nd e-mail was a perfectly justified inquiry made by the petitioner in regards to that newly discovered evidence previously withheld by his supervisor, and his conduct is easily understood against the backdrop of an accurate recitation of the chronological events.

Only by ignoring that logical sequence could the administrative law judge find the May 2nd e-mail to be offensive, and he did so from a position of bias evidenced by his repeated, frequent and overtly antagonistic derogatory statements about the petitioner, his attorney, and his attorney's presentation of his case. That offends the principles announced by this Court in *Grubka*, where a single biased statement about the petitioner was sufficient to substantiate a claim that fundamental fairness was wanting.

It is axiomatic that "due process" is not accorded unless all of its precepts are met. Basic among them is an impartial tribunal. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). The petitioner was most decidedly denied his job and his good name by a federal administrative law judge

whose conduct of the trial over which he presided was steeped in the harshest of bias. The credibility determinations of this judge are entitled to no deference.

The appellate panel took an errant path by discarding the *Grubka* holding. Had the panel applied *Grubka*, no deference would have been accorded the credibility determinations of the administrative law judge. Rather, his determinations would have fallen from the burden of bias. Accordingly, the matter should be reheard, with the proper standards being applied, and the record reviewed in light thereof to determine whether substantial evidence supports the decision.

Instead of deference, *Grubka* dictates that, on the present record which far exceeds the single statement made by the *Grubka* trial judge, reversal and remand for re-trial by a new judge is mandated. Although a judge has the "privilege and duty to take an active part in the trial where necessary", his participation must not be one-sided. *Quercia v. U.S.*, 289 U.S. 466, 470 (1933). Since the judge's participation in the proceedings was not only one-sided but hostile and invasive, *Grubka* necessitated a finding that retrial before a new judge is necessary to avoid an arbitrary result.

The Federal Circuit deferred to the administrative law judge's credibility findings to uphold its determination that the judge's decision on the merits of the petitioner's case. Certiorari should be granted to determine the proper standard of law in determining whether the deference normally accorded to a trial court's credibility determinations is rebutted by that judge's demonstrated bias, such that administrative law judge's findings, as to both guilt

and punishment, should be found to be capricious and clearly erroneous.

3. Did the Circuit Court apply the correct standard in deciding whether trial court's decision to uphold the petitioner's termination clearly erroneous, such that reversal is required on the merits?

The Federal Circuit panel deferred to the administrative law judge in its cursory review of the petitioner's assignment of error as to the punishment levied upon him. The petitioner was steadfast in his insistence of complete innocence. Even as he unrelentingly maintained that none of his actions warranted *any* discipline, he also argued, in the alternative, that no conduct by him – either taken alone or in conjunction with any other act – warranted termination. The appellate court demurred on this subject, choosing not to review the termination to determine its justice but to instead defer to the trial court. This deference to a biased judge and resultant upholding of a sanction that far outweighs any even arguable breach compounds the violation of due process that permeates the agency record.

Satisfaction of the mandate of the due process clause of the federal Constitution demands a *fair* trial in a *fair* tribunal. *Withrow v. Larkin*, *supra* at 46 (1975). This mandate applies equally to administrative law judges. *Gibson v. Berryhill*, 411 U.S. 564, 599 (1973). This requirement is accorded considerable importance by our courts; in fact, "our system of law has always endeavored to prevent even the probability of unfairness". *In re Murchison*, 349 U.S. 133, 136 (1955).

The primary focus of the discipline leading to Bieber's termination was the allegation that the May 02nd e-mail, which was the *only* conduct giving rise to disciplinary action against Bieber in this case, disrupted the workplace. In addition to the complete lack of evidence about any disruption resulting from the May 02nd e-mail, there is also present in the record evidence consisting of the May 04th e-mail from Col. Spickelmeier acknowledging the legitimacy of Bieber's May 02nd inquiry. If the Commander of the Directorate was not disrupted by Bieber's May 02nd e-mail, reacting instead with an unhelpful but acknowledging reply, how could disruption of the unit exist? The simple answer is that it could not, and certainly any blip in the flow of operations occasioned by the reading of the May 02nd e-mail by those to whom it was copy-furnished scarcely justifies termination of an employee legitimately posing the questions contained in the e-mail and noting that failure to respond as requested will be followed by the lawful exercise of that employee's right to pursue a grievance.

The April 23rd MFR was in the record; the directive to Bieber to pursue a "personal positive relationship" with his colleagues was in the record; the September 29 MFR was in the record; Col. Spickelmeier's May 04th e-mail was in the record; the contradictory testimony of Rezentes in the different proceedings was in the record. Judge Salyer had ample and legitimate reason to reverse the agency's termination of Bieber. The Court of Appeals had ample and legitimate evidence that Salyer's failure to do so was clearly erroneous, arbitrary and capricious.

As noted, the Court of Appeals deferred to the trial judge in finding that the agency's chosen punishment was appropriate, without reviewing whether that punishment

was supported in the record. Thus, the appellate court abdicated its responsibility to insure that the trial judge's decision was not "clearly erroneous". "A finding is 'clearly erroneous' when although there might well be sufficient evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed". *United States v. Gypsum*, 333 U.S. 364, 395 (1948).

This Court should grant certiorari to determine what deference is due to a trial court's findings, in this case relating to both the substantive charges and the propriety of the agency's punishment, under Rule 52(a) of the Federal Rules, where the trial judge engages in conduct which is overtly hostile towards the complaining litigant. Lacking such deference, the lower court's decision that termination was appropriate had no factual basis and should have been found to be "clearly erroneous" on the record submitted to the Court of Appeals.

The caselaw does not define "deference" due to a trial court's finding with respect to an agency's level of punishment, and certainly does not provide the parameters of that deference nor address those parameters where the record demonstrates unmistakable hostility toward the aggrieved employee by the administrative law judge. In short, the legal standard does not define the necessary showing for rebuttal of the presumption that the trial court's upholding of the agency's chosen discipline is entitled to deference. Certiorari is proper to provide guidance to both the appellate courts and the district courts confronted by this issue.

CONCLUSION

For the foregoing reasons, certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted:

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United States Court of Appeals for the Federal Circuit

01-3058

ROBERT A. BIEBER,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

Respondent.

M. Corinne Corley, Corley Law Firm, of Kansas City, Missouri, argued for petitioner.

Kyle Chadwick, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for respondent. With him on the brief were *Stuart E. Schiffer,* Acting Assistant Attorney General; *David M. Cohen,* Director; and *Deborah A. Bynum,* Assistant Director.

Appealed from: Merit Systems Protection Board in DE0752990330-I-1.

DECIDED: May 2, 2002

Before LOURIE, DYK, and PROST, *Circuit Judges*.

DYK, *Circuit Judge*.

Petitioner Robert Bieber appeals from the final decision of the Merit Systems Protection Board ("Board") denying review of a decision of the administrative judge sustaining Bieber's removal from service from the

Department of the Army ("Army") for insubordination, disrupting the workplace, and making a false statement concerning his supervisor. The primary question in this case is whether the administrative judge's conduct during a hearing deprived Bieber of due process. Because we conclude that the administrative judge's actions did not rise to the level of a due process violation and that the Board's findings are supported by substantial evidence, we affirm.

I

Bieber was a management analyst for the Army in Fort Leavenworth, Kansas, until his removal effective July 9, 1999. Before his removal, Bieber had several confrontations with co-workers and supervisors, stemming from Bieber's concerns that his co-workers wore inappropriate casual clothing and that his supervisors failed to provide adequate guidance as to what clothing was appropriate.

On April 23, 1998, Bieber's immediate supervisor, Thomas Rezentes, orally instructed Bieber that it was not Bieber's responsibility to determine what other personnel should wear, and that he should stop confronting his co-workers regarding their attire. On August 4, 1998, Bieber sent an email to his second-level supervisor, Ray Lowery, seeking "definitive guidance" as to the appropriate standard of dress in the office. He wrote that "[t]wo official documents in the last 11 months have said that appropriate dress information would be available from my supervisor," and stated that if he did not receive a response from Lowery within "say 10 working days," he would, among other things, "be sure to advise each of [his] co-workers of the policy – by no decision – decision."

On August 16, 1998, Lowery responded to the email by informing Bieber that he would respond to his concerns regarding the dress code issue as time permitted, and explicitly instructed Bieber: "In the meanwhile don't (DO NOT) expend any more resources (e.g., your time, email, the time of your fellow employees, and the time of your supervisors) on this subject."

On September 7, 1998, Bieber sent another email to Lowery regarding the dress code issue, which he copied to at least twenty-two other employees, stating that he "had enough" of waiting for Lowery's response. Bieber further stated that if he did not receive a "creditable, definitive, unambiguous and usable" answer by September 14, 1998, regarding the dress code issue, he would file a union grievance against Lowery "for abrogating [his] identified responsibility to provide direction on the appropriateness of wearing certain specific items of clothing. . . . " Bieber filed a union grievance shortly thereafter.

On September 18, 1998, Lowery and Rezentes met with Bieber to discuss the union grievance. Bieber was again told that it was not his job to monitor other employees' manner of dress, and that, although Lowery personally agreed with Bieber that jeans and sneakers were inappropriate office attire, Lowery would not forbid employees from wearing them.

On September 30, 1998, Lowery suspended Bieber for five days for discourtesy, insubordination, and refusal to obey management directives based on Bieber's circulation of the September 7, 1998, email.

Bieber challenged the suspension, and an arbitration hearing was held on April 20, 1999. At the arbitration hearing, Bieber learned for the first time that Rezentes

had drafted a Memorandum For Record ("MFR") dated April 23, 1998, stating that the types of clothing Bieber inquired about were "acceptable." Bieber construed this statement of policy as inconsistent with guidance he received September 29, 1998, that such clothing was "inappropriate but permitted." (Tr. at 274, ll. 25-26.)

On May 2, 1999, Bieber sent an email to Rezentes entitled "Guidance on Appropriate Dress for [Management Analysts] in the Workplace." In this email Bieber accused Rezentes of being a "liar," and repeated his demand for "guidance" as to whether employees in the office were permitted to wear "hats, and/or jeans, and/or sneakers . . . and/or tee shirts and/or open toed sandals without socks . . . ." He demanded that Rezentes respond within nine days, in writing, to head off "any possibility of future capriciousness or whimsey playing into his guidance." The email was copied to seventeen co-workers.

On May 7, 1999, and May 10, 1999, several of Bieber's co-workers wrote to Rezentes complaining of Bieber's confrontational behavior and expressing concern that he might turn violent, and asked if it was safe to come to work on May 11, 1999, the deadline set in Bieber's email. (Tr. at 16.) On June 3, 1999, Rezentes issued to Bieber a notice of proposed removal for "insubordination; failure to obey a management directive; disrupting the workplace; and making a false statement against your supervisor." On July 6, 1999, Lowery issued a written notice of his decision to remove Bieber from federal service.

Bieber filed an appeal with the Board on July 27, 1999. The case was assigned to an administrative judge, and the administrative judge conducted a hearing on November 9, 1999.

In the course of the hearing, the administrative judge denigrated Bieber's concerns (for example, stating that "I really think what people wear to work is no concern of their fellow employees," (Tr. at 277, ll. 21-22), and asking "[b]ut why . . . didn't Mr. Bieber just shut up?" (Tr. at 102, ll. 21-22)), and repeatedly stated that he could not understand why Bieber "continued to be obsessed with [the dress code issue]." (Tr. at 101, ll. 16-20.) The administrative judge went so far as to state that Bieber's frequent berating of his coworkers regarding their clothing "defies civility to me." (Tr. at 279, ll. 9-16.)[1] Bieber did not file a motion to recuse the administrative judge, and complains of bias for the first time on appeal to this court from the Board's decision.

On February 10, 2000, the administrative judge issued an Initial Decision sustaining the removal, finding that Bieber willfully disobeyed his supervisors' instructions to stop confronting his co-workers and supervisors regarding their clothing; that Bieber's actions disrupted the workplace; that Bieber falsely accused his supervisor of lying; and that removal was an appropriate penalty. *Bieber v. Dep't of Army,* No. DE-0752-99-0330-I-1, (M.S.P.B. Feb. 10, 2000) ("*Initial Decision*").

On September 13, 2000, the Board declined to review the Initial Decision, making it the final decision of the

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[1] The administrative judge further stated: "I'm really groping to understand why you behaved as you did and I'm not hearing anything," (Tr. at 280, ll. 10-11); asked "[w]hat difference does it make to you what other people are wearing? What earthly difference, Mr. Bieber?" (Tr. at 280, ll. 20-21); and warned Bieber that "[y]ou're losing it." (Tr. at 307, l. 4.)

Board. Bieber's timely petition for review followed. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(9).

II

We must sustain the Board's decision unless it is: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c) (2000).

III

Bieber argues that this court's decision in *Grubka v. Department of the Treasury,* 858 F.2d 1570 (Fed. Cir. 1988) (per curiam), requires that we reverse because the administrative judge's conduct violated Bieber's right to due process and "a meaningful opportunity to be heard." The requirements of due process, of course, apply to administrative proceedings. *Utica Packing Co. v. Block,* 781 F.2d 71, 77 (6th Cir. 1986). In *Grubka,* we reversed the Board's decision sustaining the Internal Revenue Service's demotion of petitioner Grubka as not supported by substantial evidence. We found that the administrative judge demonstrated "undeniable bias" against Grubka by commenting that "[a]fter going too far, [Grubka] was caught," meaning apparently caught engaging in misconduct. *Grubka,* 858 F.2d at 1574. We noted that "this statement . . . shows undeniable bias on the part of the [administrative judge] against Grubka, and makes the [administrative judge] partisan against Grubka when he should have been neutral and nonpartisan," and that "[t]his statement

tainted [the administrative judge's] decision on credibility in this [misconduct] charge, as well as in all of the other charges in this case," thereby depriving Grubka of due process. *Id.* at 1575. Rather than remanding for a new trial, however, the court simply reversed the Board and remanded with instructions to restore Grubka to his former position, because it found that there was no record evidence of impropriety to sustain the demotion. *Id.* at 1576-77.

Here some of the administrative judge's comments during the November 9, 1999, hearing might well fall within the *Grubka* standard. We do not condone the remarks of the administrative judge. While the majority of the administrative judge's actions of which appellant complains constituted routine trial management, some of the administrative judge's remarks were plainly inappropriate. Nonetheless, we conclude that the due process aspect of *Grubka,* which was dictum in any event, is no longer good law in light of the Supreme Court's subsequent decision in *Liteky v. United States,* 510 U.S. 540 (1994), decided six years after *Grubka.*

In *Liteky,* the Supreme Court recognized that a showing of "deep-seated . . . antagonism" toward a party is necessary for a successful bias or partiality motion under the federal judicial recusal statute, 28 U.S.C. § 455 (1994), where the motion is based on the judge's conduct in the course of the proceeding:[2]

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[2] Subsection (a) of that statute provides, in pertinent part, that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably

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> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion *unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.* Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky, 510 U.S. at 555 (first emphasis added).

To be sure, *Liteky* concerned judicial bias in the context of recusal, and here neither the federal judicial recusal statute nor the recusal statute specifically governing administrative judges, 5 U.S.C. § 556(b), applies because Bieber does not seek the administrative judge's recusal, but rather seeks a new hearing. Nonetheless, we think that the same standard, requiring a showing of "a deep-seated favoritism or antagonism that would make fair judgment impossible," must govern in both contexts. Other courts of appeals have applied *Liteky* outside of the recusal context, where a party seeks a new trial on the

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be questioned." 28 U.S.C. § 455(a) (1994). Subsection (b) further provides, in pertinent part, that any of those judicial officers "shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party. . . ." *Id.*

ground that the judge's bias in the course of the proceedings deprived that party of a fair trial. In *United States v. Donato,* 99 F.3d 426 (D.C. Cir. 1996), the District of Columbia Circuit applied *Liteky* to reverse defendant's conviction and remand for a new trial where the district judge's conduct "crossed [the *Liteky*] threshold" in that the district court judge's "hostility" to defendant and her counsel "reveal[ed] such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* at 435 (quoting *Liteky,* 510 U.S. at 555). The court noted that the district judge's degrading comments to defendant and near-constant criticism of her attorney "raise in us a serious doubt as to whether this defendant received a fair trial." *Id.* at 438. The court reversed defendant's conviction and reassigned the case to a different judge. *Id.* at 439.

In *Logue v. Dore,* 103 F.3d 1040, 1045 (1st Cir. 1997), the First Circuit applied *Liteky* in finding that plaintiff-appellant failed to establish that the judge's comments during trial deprived him of an impartial trial where plaintiff-appellant contended that the judge interjected hostile questions during his testimony, and treated defendant's testimony "solicitously." Citing *Liteky,* the court found that the judge's comments indicated "no more than that [the judge] had grave doubts [about] Logue's credibility," and that "the mere fact that the judge voices his opinion out of the presence of the jury does not irretrievably taint the trial." *Id.* at 1046. The court further cited *Liteky* in holding that the judge's "mid-trial remarks critical of counsel are insufficient to sustain a claim of judicial bias or partiality against the client," and further stated that the judge's statements made in the jury's presence "did not compromise the fundamental fairness of

the proceedings," in that a judge's routine efforts at court administration do not evince bias or partiality. *Id.* at 1046.

Although *Donato* and *Logue* involve the conduct of judges presiding over jury trials rather than bench trials, we think the same standard ought to apply regardless of whether the trier of fact is a jury or judge.

IV

Here, the administrative judge's comments simply do not rise to the *Liteky* threshold of evidencing "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky,* 510 U.S. at 555. The administrative judge's comments in this case were in fact less objectionable than the judge's statements and conduct in *Logue,* where the judge stated that "I totally disbelieve plaintiff in this case" and "I think he's an absolute and incorrigible liar." *Logue,* 103 F.3d at 1046. The court in *Logue* found that these comments did not violate due process under *Liteky.* Likewise, the administrative judge's comments in this case, while in some instances inappropriate, do not violate due process under *Liteky* and thus do not warrant a new hearing.[3]

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[3] Although section 455 does not contain a timeliness requirement, most courts have read into the statute a requirement of timeliness. *See United States v. Rogers,* 119 F.3d 1377, 1380 (9th Cir. 1997) ("Absent a timeliness requirement, parties would be encouraged to 'withhold recusal motions, pending a resolution of their dispute on the merits, and then if necessary invoke section 455 in order to get a second bite at the apple.'") (quoting *E. & J. Gallo Winery v. Gallo Cattle Co.,* 967 F.2d 1280, 1295 (9th Cir. 1992)); *see also United States v. York,* 888 F.2d 1050, 1053-55 (5th Cir. 1989) (concluding that there is a timeliness

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V

We also conclude that the administrative judge's findings of fact are supported by substantial evidence. Those findings rest in substantial part on credibility determinations. The credibility determinations of an administrative judge are virtually unreviewable on appeal. *Pope v. United States Postal Serv.*, 114 F.3d 1144, 1149 (Fed. Cir. 1997) ("As an appellate court, we are not in [a] position to re-evaluate these credibility determinations, which are not inherently improbable or discredited by undisputed fact."); *see also Haebe v. Dep't of Justice*, No. 01-3119, slip op. at 19-20 (Fed. Cir. Apr. 29, 2002). Bieber basically requests us to re-weigh conflicting evidence; this is not our function, and the inappropriate comments of the administrative judge do not warrant our disregarding his factual findings or his credibility determinations.

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requirement under both subsections of section 455, and discussing other circuits that have imposed a similar timeliness requirement). There is also no explicit timeliness requirement in 5 U.S.C. § 556(b). Here we need not decide whether Bieber waived his right to object to the administrative judge's alleged bias on due process grounds (by failing to file a timely recusal motion), because we find that the administrative judge's conduct did not rise to the level of the *Liteky* standard.

Moreover, nothing we say here should be construed to deny the Board or this court the authority to order a case reassigned on remand if there is evident bias, even though it does not satisfy the *Liteky* standard. *Gallagher v. Dep't of Air Force*, 84 M.S.P.R. 441, 443 (1999) (reassigning case on remand to a different administrative judge because "the appearance of partiality here has sufficiently tainted the proceeding below. . . . "). In *Liteky*, the Supreme Court suggested that reviewing bodies have discretion to require reassignment upon remand even where recusal would not be required. *Liteky*, 510 U.S. at 554.

Substantial evidence supports the Board's findings that Bieber was insubordinate. Insubordination is "a willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed." *Phillips v. Gen. Servs. Admin.*, 878 F.2d 370, 373 (Fed. Cir. 1989) (emphasis omitted). Bieber was repeatedly instructed to stop distracting his co-workers and using office resources to express his displeasure with, and alleged confusion regarding, the office dress policy. Despite these warnings, Bieber sent the May 2, 1999, email. Bieber argues that he sent the email merely to obtain clarification of "previously undisclosed documentation of management's position . . . where that position [allegedly] contradicted the position previously taken by management." But the administrative judge determined that Bieber's claim that management never provided him with clarification concerning what was acceptable dress in the office wholly lacked credibility. The Board's credibility determination is neither "inherently improbable [n]or discredited by undisputed fact." *Pope,* 114 F.3d at 1149.

Substantial evidence also supports the Board's finding that Bieber disrupted the workplace. The record shows that Bieber's conduct toward his co-workers and superiors concerning the dress code issue severely disrupted the Maneuver Branch. It is undisputed that Bieber "was openly intolerant of, ridiculed, and abused fellow employees who wore jeans, baseball caps, and sneakers in the workplace." *Initial Decision,* at 6 n.2. His supervisors testified that dealing with Bieber on the dress code issue consumed a tremendous amount of time and resources, and several employees testified that they were frightened by the deadline set in Bieber's May 2, 1999, email.

Substantial evidence supports the Board's finding that Bieber made a false statement regarding his supervisor. It is undisputed that Bieber accused Rezentes of lying to him about the dress code issue in his May 2, 1999, email. Bieber argues that "[t]here is no direct evidence" that he knowingly made a false accusation against Rezentes. The administrative judge weighed the credibility of both Bieber and Rezentes and found it "quite unlikely that Rezentes would have lied to the appellant about a matter as mundane as Lowery getting back to the appellant about the dress code issue." *Initial Decision,* at 12. The administrative judge concluded "I find it far more likely that, given the appellant's frustration or anger about the dress code issue, he intentionally falsely accused Rezentes of lying to him." *Id.* Again, the Board's credibility determination is neither "inherently improbable [n]or discredited by undisputed fact." *Pope,* 114 F.3d at 1149. We accordingly affirm the Board's decision sustaining the charges against Bieber.

Bieber also contends that the penalty of removal was unreasonable. However, our review of the penalty imposed by the agency is "highly deferential," *Webster v. Dep't of Army,* 911 F.2d 679, 686 (Fed. Cir. 1990), *cert. denied,* 502 U.S. 861 (1991), and requires a showing that the penalty is "grossly disproportionate to the offense charged." *Miguel v. Dep't of Army,* 727 F.2d 1081, 1083 (Fed. Cir. 1984). There was no demonstration here that Bieber's removal was grossly disproportionate to his offense.

CONCLUSION

For the foregoing reasons, the decision of the Merit Systems Protection Board is affirmed.

COSTS

No costs.

AFFIRMED

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT A. BIEBER, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DE-0752-99-0330-I-1 DATE: SEP 13 2000

Jeffrey L. Baxter, Esquire, Leavenworth, Kansas, for the appellant.

Captain Katharine A. Varney, Esquire, Fort Leavenworth, Kansas, for the agency.

BEFORE

Beth S. Slavet, Acting Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable,

evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title

5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other related material at our web site, http://www.mspb.gov.

FOR THE BOARD: /s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

ROBERT A. BIEBER, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DE-0752-99-0330-I-1 Date: February 10, 2000

Jeffrey L. Baxter, Esquire, Leavenworth, Kansas, for the appellant.

Captain (CPT) Katharine A. Varney, Esquire, Fort Leavenworth, Kansas, for the agency.

BEFORE

Jack E. Salyer
Administrative Judge

INITIAL DECISION

The appellant timely appealed to the Merit Systems Protection Board (the Board) from the action of the agency, Fort Leavenworth, Kansas, removing him from the position of Management Analyst effective July 9, 1999. The appellant has appeal rights to the Board from the agency's action under 5 U.S.C. §§ 7511(a)(1)(A), 7512(1), 7513(d), and 7701(a).

For the reasons outlined below, I AFFIRM the appellant's removal.

ANALYSIS AND FINDINGS

Background

The following salient facts are undisputed unless otherwise stated. At all pertinent times, the appellant was employed as a Management Analyst in the Maneuver Branch, Documentation Division – Leavenworth, Requirements Documentation Directorate (RDD), Fort Leavenworth, Kansas. The appellant's immediate supervisor was Thomas B. Rezentes, Chief, Maneuver Branch; and his second-level supervisor was Louis R. Lowery, Chief, Documentation Division – Leavenworth. On May 25, 1998, the appellant received a written reprimand for becoming loud and for demonstrating a belligerent, intimidating, and threatening attitude toward a co-worker. Effective October 19, 1998, the appellant was suspended for five calendar days for discourtesy, insubordination, and refusal to obey management directives.[1]

On June 3, 1999, Rezentes proposed the appellant's removal for insubordination, failure to obey a management directive, disrupting the workplace, and making a false statement against his supervisor (Rezentes). The appellant made both written and oral replies to the deciding official, Lowery. On July 6, 1999, Lowery issued a decision removing the appellant effective July 9, 1999. The appellant subsequently filed the present appeal. On November 9, 1999, I convened an evidentiary hearing. The record closed with my receipt of closing briefs. *See generally* Appeal File.

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[1] The appellant filed a grievance concerning the 30-day [sic] suspension. After a hearing, the arbitrator upheld the suspension.

Burdens of proof

As to the merits of the appeal, the agency must prove the facts of its misconduct charges by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(a)(1)(ii). Preponderance of the evidence is defined by regulation as that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than not true. 5 C.F.R. § 1201.56(c)(2). If the agency proves the charges, it must additionally demonstrate that disciplinary action is warranted for the sustained charges and that the penalty selected is within tolerable limits of reasonableness. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981).

The agency has proven by a preponderance of the evidence the charges of insubordination, failure to obey a management directive, disrupting the workplace, and making a false statement against a supervisor.

The agency proposed and effected the appellant's removal for insubordination, failure to obey a management directive, disrupting the workplace, and making a false statement against his supervisor. Appeal File, Tabs 4(E) and 3(B).

The specifications supporting the above charges read as follows:

> a. On 2 May 1999, you sent an insubordinate and disruptive message to me [supervisor Rezentes], with copies furnished to numerous members of the Maneuver Branch; my first line supervisor, Mr. Ray Lowery; and my second line supervisor, COL Roger Spickelmier. . . . In that message, among other statements, you falsely and insubordinately asserted that I was a liar.

You specifically stated: "First, I have gone on record as identifying you as a liar in this issue and grievance process. I continue to hold and have affirmed that finding." You went on to issue me a directive to provide you with a response to your e-mail no later than 11 May 1999. In the message, you further insubordinately stated that one of the purposes of requesting a response in writing was to head off "any possibility of capriciousness or whimsey playing" into Mr. Lowery's guidance. In sending the message, you were insubordinate and disruptive, and you violated Mr. Lowery's written order not to expend any more resources and time on the dress code issue as discussed in paragraph d(3) below.

b. You have been given guidance for over a year regarding acceptable dress standards in RDD Maneuver Branch. Despite this guidance, you continued to obsessively pursue the issue and solicit involvement of your fellow employees by furnishing them with packets of information, copies of your grievances, extensive e-mails, and other information wholly unrelated to their positions, mainly outlining your disagreement that items such as jeans and tennis shoes are permitted in the workplace.

c. Numerous co-workers have expressed concerns ranging from being irritated and uncomfortable with your actions to feeling threatened by your disruptive and unrelenting behavior. Many have stated that they work in a hostile work environment as a result of your actions. By the time of your e-mail, the subject of this notice, at least five individuals have approached management in person or in writing saying that they fear you may become violent or "go postal" or words to that effect over the dress issue. Several

employees also approached me regarding the 11 May 1999 deadline on which you required an answer to your e-mail to me. They expressed concern about their safety and asked if they should take annual leave that day. One individual even requested information on workplace violence.

d. Your flagrant and intentional actions are serious and have severely disrupted the workforce and undermined management's ability to maintain employee efficiency, morale, and discipline. You were counseled, warned, and disciplined regarding previous conduct in the workplace related to the dress issue, yet your disruptive and improper behavior continued. I refer you to some of the specific instances to which I refer:

(1) On 23 April 1998, I directed you to cease and desist with any verbal harassment of co-workers concerning their manner of dress. I also informed you not to inflict your personal opinion on other employees. . . . Mr. Ray Lowery reinforced my verbal directive on 23 April 1998 when he told you that it was not within the purview of your official duties and responsibilities to determine appropriate dress of other workers.

(2) On 25 May 1998, you received a letter of reprimand when you became loud and demonstrated a belligerent, intimidating, and threatening attitude toward a co-worker. . . . On the day in question, the employee had merely entered your shared cubicle area to speak with some other fellow employees.

(3) On 4 August 1998, you sent an e-mail to Mr. Lowery concerning clarification of appropriate dress in the workplace. On 16 August 1998, Mr. Lowery told you he would respond to your note as

time permitted. He further gave you the following directive which you chose to ignore by submitting the e-mail outlined in paragraph 2a above: "DO NOT expend any more resources (e.g., your time, e-mail, the time of your fellow employees, and the time of your supervisors) on this subject". . . . That directive, of course, did not preclude you from filing a grievance. It did, however, preclude your sending an e-mail to the employees of the maneuver branch outlining your demands, belaboring the dress issue, making false statements, and displaying insubordination to your supervisors.

(4) On 2 September 1998, I gave you a written directive to limit your contact with Mr. Torres to documentation-related business. . . . The memorandum was intended to resolve the constant distraction being created when you entered Mr. Torres' work area and rudely commented on his attire, role modeling, or words to that effect.

(5) On 7 September 1998, you sent a lengthy and disrespectful e-mail message to Mr. Lowery regarding the dress issue, with copies furnished to at least 22 other RDD employees, including Mr. Torres. . . . In the e-mail you inappropriately chastised Mr. Lowery and violated his 16 August 1998 directive and my 2 September 1998 directive. Accordingly, you were suspended for five days without pay, effective 19 October 1998 through 23 October 1998. . . . In the notice of decision, you were informed that it was management's desire in effecting the suspension that you understand that your disruptive behavior is inappropriate and contrary to the mission.

3. Your recent e-mail to me, with copies furnished to many others who work for me, accusing

> me of being a liar and referencing Mr. Lowery in a negative manner, cannot be tolerated as it intentionally undermines management's credibility within the organization. Additionally, you have been firmly directed not to involve other workers in this matter, unless, of course, they are involved on your behalf as witnesses for grievance or other related matters. You have been afforded every opportunity to utilize appropriate avenues to express employment concerns. Your intentional disregard for management's directives, however, has infringed upon the time of coworkers who have expressed no interest or desire in becoming involved. Such behavior is contrary to the maintenance of proper discipline and will not be tolerated.

Appeal file, Tab 4(E).

For the following reasons, I find that the agency's charges and specifications are supported by a preponderance of the evidence. First, I find that, because the charges of insubordination and failure to obey a management directive are essentially the same charge, I will discuss them together. Addressing the charges of insubordination/failure to obey a management directive first, a charge of insubordination requires proof of intentional and willful refusal to obey an order entitled to be obeyed, rather than a negligent or otherwise unintentional failure to obey an order. *See Hamilton v. United States Postal Service*, 71 M.S.P.R. 547, 555 (1996); *Johnson v. Department of Justice*, 61 M.S.P.R. 110, 113 (1996).

At the outset, I find it important to examine the context in which the appellant's alleged insubordination and failure to obey a management directive occurred. I find it clear, primarily because the appellant candidly

admits to it, but also because there is overwhelming corroborating evidence, *see generally* the Appeal File and Hearing Transcript (Tr.), that, for reasons which are not apparent from the record, the frankly trivial subject of a workplace dress code has long been of critical importance to him. I also find it largely undisputed that the appellant's relentless obsession with the notion of a dress code has driven him to engage in bizarre behavior concerning the dress code issue to the point of abusing (both verbally and by gestures) fellow employees whom he believed were inappropriately dressed[2] as well as disrupting his fellow employees and supervisors by flooding them with e-mails, informational packets, copies of his prior disciplinary actions and grievances, and so forth. *See generally* the Appeal File and Tr.[3]

Similarly, I find it useful to address at the outset an ingenious, but ultimately specious, defense raised by the appellant to several of the charges, i.e., that much of his alleged misconduct was attributable to his "innocent" attempts to obtain clarification from management concerning a dress code policy for the Maneuver Branch. In this vein, the appellant testified that he could never get satisfactory answers from his superiors to his questions about the dress code issue. However, the appellant also admitted that Rezentes had told him that, while he (Rezentes)

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[2] In particular, it is undisputed that the appellant was openly intolerant of, ridiculed, and abused fellow employees who wore jeans, baseball caps, and sneakers in the workplace. *See generally* Tr.

[3] I note that the appellant does not claim that his frankly bizarre conduct was based on mental illness (e.g., an obsessive-compulsive disorder) or that the agency discriminated against him on the basis of a mental disability. *See generally* Appeal File.

personally believed that certain clothing items were inappropriate, management was not going to promulgate the dress code sought by him because the apparel in question had already been deemed officially appropriate for the workplace. Tr. 260-61, 268-69, 274-75.

Rezentes and Lowery expressly corroborated the appellant's testimony as to the guidance which Rezentes gave the appellant. Rezentes testified that the appellant was told on six or eight occasions that casual dress (e.g., blue jeans, baseball caps, and tennis shoes) had been officially deemed to be appropriate dress for the work unit although he (Rezentes) *personally* believed it to be inappropriate. Lowery testified that he also had expressly told the appellant that the dress items which he objected to were going to be officially tolerated in the workplace even though he (Lowery), like Rezentes, also *personally* believed them to be inappropriate. Tr. 5-6, 18, 28-29, 38, 54-55, 61-62, 79-80 ,94, 118.

Based on the foregoing testimonies, I find the appellant's claim that management never provided him with clarification concerning what was acceptable dress in the Maneuver Branch to be wholly lacking in credibility. I find that nothing could have been clearer than Rezentes' and Lowery's repeated explanations to the appellant that, while they personally might have agreed with him that certain articles of clothing were inappropriate, they were nonetheless going to be officially allowed and tolerated. Thus, I find highly implausible the appellant's claim that he never received management clarification concerning a dress code for the Maneuver Branch. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458, 461 (1987).

Furthermore, Rezentes and Lowery both testified, and the appellant does not dispute, that he was directed by them: (1) to cease and desist harassing fellow employees about the dress code issue and (2) to expend no further resources concerning the matter. Rezentes and Lowery also testified, and again the appellant does not dispute, that, after being given the foregoing orders, he did not obey them. Instead, the appellant continued to harass fellow employees and to expend agency resources concerning the dress code issue. Finally, the witnesses testified that the appellant's May 2, 1999, message to Rezentes, which he sent to numerous fellow employees and agency managers, was an especially flagrant act of insubordination and defiance. Tr. 5-66, 70-122. Moreover, the testimonies of Lowery and Rezentes were expressly corroborated by the in-person testimonies and the stipulated testimonies of several fellow employees of the appellant.[4] I find that some of the harassing incidents testified to by these witnesses occurred in the timeframe after the cease-and-desist orders were given to the appellant by his supervisors. *See generally* Tr. 124-250.

In contrast, while either candidly admitting, or not denying, which amounts to the same thing, that he had previously harassed fellow employees when he did not believe that they were dressed appropriately, the appellant ingeniously argues that, from approximately October 1998, to May 1999, he obeyed Rezentes' and Lowery's orders. The appellant also creatively argues that, because

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[4] Interestingly enough, the fellow employees called as witnesses by the appellant gave testimony favorable to the agency not to him. *See generally* Tr.

his May 2, 1999, message to Rezentes did not actually focus on the dress code issue, he did not disobey Rezentes' and Lowery's orders when he sent it. Tr. 256-326.

Because of the divergent testimonies, I find it necessary to address the relative credibility of the respective witnesses. *See Hillen*, 35 M.S.P.R. at 453. I find that the testimonies of Lowery, Rezentes, and the fellow employee witnesses are articulate, internally consistent, and consistent one with another. Therefore, I find no basis for concluding that any of the foregoing witnesses lack credibility. *See Hillen*, 35 M.S.P.R. at 460.

In contrast, I find the appellant lacking in credibility for the following reasons. First, I find the appellant to lack credibility because of my previous finding concerning the sheer implausibility of his claim that he was merely attempting to obtain clarification concerning the dress code issue. *See Pedersen v. Department of Transportation*, 9 M.S.P.R. 195, 198 (1981). I also find the appellant's credibility to be adversely affected by the numerous inconsistencies between his wholly uncorroborated testimony and (1) the testimonies of all of the other witnesses concerning his continuing harassment of fellow employees he viewed as dressing inappropriately and (2) the substance of his May 2,1999, message to Rezentes. In particular, I find that the appellant's claim that the focus of his May 2, 1999, message to Rezentes was not on the dress code issue at all to be belied by the subject matter and the intemperate language of that message. Appeal File, Tab 4(E), Enclosure 1; *see Hillen*, 35 M.S.P.R. at 460.

Accordingly, based on the evidence of record and the foregoing credibility findings, I find that, after being given lawful orders to stop harassing fellow employees about

their apparel and to cease expending resources on the dress code issue, the appellant deliberately and intentionally disobeyed those orders. *See Hamilton*, 71 M.S.P.R. at 555; *Johnson*, 61 M.S.P.R. at 113. Therefore, the charges of insubordination and failure to obey a management directive are found to be supported by a preponderance of the evidence, and they are sustained. 5 U.S.C. § 7701(c)(1)(B).

Turning to the charge of disrupting the workplace, I find that the record contains overwhelming evidence that the appellant's conduct over a span of several years concerning the dress code issue severely disrupted the Maneuver Branch. First, without elaborately getting into specifics, several fellow employees testified, and the appellant essentially did not dispute, that he constantly harassed, both verbally and by gestures, fellow employees whom he believed were inappropriately dressed. These witnesses also testified, either directly or by stipulation, again without dispute, that the appellant's relentless obsession with the dress code issue and his harassment of fellow employees caused one employee (Bill Dillon) to actually resign from his position and caused other employees to become concerned for their personal safety. The witnesses further testified that the appellant constantly flooded Maneuver Branch employees with unwanted paperwork and e-mail communications concerning the dress code issue. Tr. 124-250.

Rezentes and Lowery, from their management perspectives, expressly corroborated the foregoing testimonies. Rezentes and Lowery also testified that dealing with the appellant on the dress code issue took up immense amounts of time on a completely trivial issue which they could more profitably have used in managing their work units. Rezentes and Lowery further testified that several

of the appellant's fellow employees came to them with safety concerns such as what could happen if the appellant's relentless obsession with the dress code issue caused him to "snap." Rezentes and Lowery also testified that several employees professed to them that they were frightened by the deadline set by the appellant in his May 2, 1999, message to the point of requesting annual leave for the day in question. Finally, Rezentes and Lowery testified that the overall impact of the appellant's obsessive and abusive behavior concerning the dress code issue was to render the Maneuver Branch workplace dysfunctional. Tr. 5-66, 70-122.

In contrast, while denying the overall charge of disrupting the work place, the appellant either admitted, or, importantly, did not deny, that, when he believed that fellow employees were dressed inappropriately, he would verbalize his feelings to them and that the foregoing had even led to shouting matches over the issue. The appellant also did not dispute the testimony of several witnesses that his conduct toward employee Bill Dillon actually caused the latter to resign from his position. The appellant further testified that he believed that he had a right to vocalize his concerns about appropriate dress to those he believed were inappropriately dressed. The appellant further testified that he believed that he had a right to continually bring, and rebring, the dress code issue to management's attention. The appellant also either admitted, or did not deny, that he had incessantly bombarded both fellow employees and agency managers with paperwork and e-mails concerning the dress code issue. Tr. 256-326.

Because of the appellant's candid admissions, I find that I need not address the relative credibility of the

respective witnesses concerning the charge and underlying specifications of disrupting the workplace. I therefore find that the record contains overwhelming evidence that the appellant's conduct concerning the dress code issue severely disrupted the Maneuver Branch workplace. I also find that the appellant was not entitled to be the clothing monitor or "policeman" for the Maneuver Branch or to badger fellow employees and agency managers about the dress code issue. I also find that, even assuming arguendo that the appellant appropriately raised the dress code issue initially, he was certainly not free to pursue the matter after it had been made explicitly clear to him what the work unit's dress policy was going to be (or not going to be, as the case may be) and that certain items of clothing apparel to which the appellant objected were nonetheless going to be tolerated or allowed. Therefore, I find that the charge of disrupting the workplace is supported by a preponderance of the evidence, and it is sustained. 5 U.S.C. § 7701(c)(1)(B).

Turning to the final charge, i.e., that the appellant made a false statement that Rezentes had lied to him, it is undisputed that, in the appellant's May 2, 1999, message, he accused Rezentes of lying to him about the dress code issue. Appeal File, Tab 4(E), Enclosure 1. During the hearing, the appellant testified that Rezentes lied to him because Rezentes had not told him that Lowery would get back to him about the dress code issue but had told others that he had told the appellant that Lowery would get back to him. Tr. 306-11, 328-29. In contrast, Rezentes testified that he did not lie to the appellant because he told the appellant that Lowery would get back to him about the dress code issue. Tr. 12-13, 17-19.

Addressing the relative credibility of the respective witnesses, because of my prior findings concerning the appellant's lack of credibility, I find him lacking in credibility here. *See Pedersen*, 9 M.S.P.R. at 198. I also find the appellant lacking in credibility because of the implausibility of the alleged lie – I find it quite unlikely that Rezentes would have lied to the appellant about a matter as mundane as Lowery getting back to the appellant about the dress code issue. I find it far more likely that, given the appellant's frustration or anger about the dress code issue, he intentionally falsely accused Rezentes of lying to him. *See Hillen*, 35 M.S.P.R. at 461; *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986).

In sum, I have found that all of the agency's charges are supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B).

The appellant's removal based on the sustained charges promotes the efficiency of the service and is an appropriate penalty under all the facts and circumstances.

The agency's adverse action must be "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). I find that taking disciplinary action against the appellant based on the sustained charges of insubordination, failure to obey a management directive, disrupting the workplace, and making a false statement against his supervisor clearly promotes the efficiency of the service. 5 U.S.C. § 7513(a).

The remaining issue for analysis is the appropriateness of the penalty of removal. In *Douglas*, 5 M.S.P.R. at 306, the Board held that it would review an imposed penalty to insure that the agency conscientiously considered the relevant factors in choosing the penalty and

struck a responsible balance within tolerable limits of reasonableness. The Board will not disturb an agency's action and will accord deference to it if it is the maximum reasonable penalty which may be imposed after giving consideration to all the relevant factors. *See Capito v. Veterans Administration*, 39 M.S.P.R. 289, 292 (1988), *aff'd*, 889 F.2d 1099 (Fed. Cir. 1989) (Table); *Davis v. Department of the Treasury*, 8 M.S.P.R. 317, 320-21 (1981).

For the following reasons, I find that removal was an appropriate penalty under all the facts and circumstances in the appeal. First, I find that the appellant engaged in extremely serious misconduct. I find that the appellant, obsessed as he was with having a dress code in the Maneuver Branch, took his obsession to the point of harassing employees whom he subjectively believed were inappropriately dressed. The appellant also incessantly bombarded the employees of the Maneuver Branch and other agency employees and managers, all of whom could have cared less about such a trivial matter, with e-mails, written documents, and other materials reflecting his dress code views. Furthermore, despite repeated guidance from his supervisors concerning the clothing items which would be allowed in the Maneuver Branch, despite direct orders to cease harassing fellow employees and using agency resources to publicize his dress code views, and despite being repeatedly counseled and then reprimanded and suspended for continuing acts of misconduct, the appellant continued to badger fellow employees and agency managers about the dress code issue. The appellant's continuing misconduct culminated in his abusive, disrespectful, and (in the opinion of some witnesses, Tr.) threatening message to Rezentes on May 2, 1999.

Neither the agency nor its employees are required to tolerate abusive behavior on the part of any employee such as was displayed by the appellant in connection with the dress code issue. Furthermore, no employee should have to endure the irritating, unpleasant behavior committed by the appellant. In addition, I find that the appellant's conduct was not conducive to the maintenance of a stable working atmosphere, and that the agency had a right to expect him to comport himself in accordance with accepted standards of conduct. *See Wilson v. Department of Justice*, 68 M.S.P.R. 303, 310 (1995); *Johnson v. Department of Justice*, 65 M.S.P.R. 46, 52 (1994), *dismissed*, 48 F.3d 1236 (Fed. Cir. 1995) (Table). Finally, no agency need tolerate reckless accusations against a supervisor.

I also find that the appellant has displayed no remorse for his misconduct and that he is not a good candidate for rehabilitation. In this connection, I note the appellant's candid hearing testimony that, even at that point, he did not believe that he had done anything wrong. Tr. 295. Moreover, I also find that the appellant does not appear to understand that, absent health and safety considerations, what his fellow employees wore to work was truly none of his business. However, that the appellant has been, and remains, in denial of the nature of his misconduct does not mitigate the seriousness of it.

Finally, I find that the aggravating factors set out above heavily outweigh the appellant's nearly 30 years of Federal civilian and military service and the consistently

acceptable or better level of his performance.[5] Accordingly, I find the penalty of removal to be appropriate, i.e., "reasonable," under all the facts and circumstances in the case. *See Wilson*, 68 M.S.P.R. at 310; *Johnson*, 65 M.S.P.R. at 52.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /s/ Jack E. Salyer
Jack E. Salyer
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail, unless otherwise indicated below, this day to each of the following:

Appellant

Robert A. Bieber, Jr.
9909 Belleview Avenue
Kansas City, MO 64114-4243

Appellant's Representative(s)

Jeffrey L. Baxter, Esq.
1818 Ridge Road
Leavenworth, KS 66048

[5] *See* n.3. The appellant does not claim that mental illness was a mitigating factor.

Agency's Representative(s)

Cpt Katherine A. Varney, Esq.
Office of the Staff Judge Advocate
415 Custer Avenue
Fort Leavenworth, KS 66027-2313

Other

Kenneth L. Bates
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W., Room 7412
Washington, DC 20415

February 10, 2000
(Date)

/s/ Jack E. Salyer
Jack E. Salyer
Administrative Judge

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

United States Court of Appeals
for the Federal Circuit

ORDER

(Filed Jul. 10, 2002)

A combined petition for panel rehearing and for rehearing en banc having been filed by the PETITIONER, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on July 17, 2002.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: July 10, 2002

CC: M. Corinne Corley
Kyle E. Chadwick

BIEBER V ARMY, 01-3058
(MSPB – DE0752990330-I-1)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

United States Constitution, Amendment V, Due Process Clause.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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5 U. S. C. § 7511. Definitions; application

(a) For the purpose of this subchapter –

(1) "employee" means –

(A) an individual in the competitive service –

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions –

(i) in an Executive agency; or

(ii) in the United States Postal Service or Postal Rate Commission; and

(C) an individual in the excepted service (other than a preference eligible) –

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the same or similar positions in an

Executive agency under other than a temporary appointment limited to 2 years or less;

(2) "suspension" has the same meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter does not apply to an employee –

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by –

(A) the President for a position that the President has excepted from the competitive service;

(B) the Office of Personnel Management for a position that the Office has excepted from the competitive service; or

(C) the President or the head of an agency for a position excepted from the competitive service by statute;

(3) whose appointment is made by the President;

(4) who is receiving an annuity from the Civil Service Retirement and Disability Fund, or the Foreign Service Retirement and Disability Fund, based on the service of such employee;

(5) who is described in section 8337(h)(1), relating to technicians in the National Guard;

(6) who is a member of the Foreign Service, as described in section 103 of the Foreign Service Act of 1980;

(7) whose position is within the Central Intelligence Agency or the General Accounting Office;

(8) whose position is within the United States Postal Service, the Postal Rate Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, an intelligence component of the Department of Defense (as defined in section 1614 of title 10), or an intelligence activity of a military department covered under subchapter I of chapter 83 of

title 10, unless subsection (a)(1)(B) of this section or section 1005(a) of title 39 is the basis for this subchapter's applicability;

(9) who is described in section 5102(c)(11) of this title; or

(10) who holds a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under section 7401(3) of such title.

(c) The Office may provide for the application of this subchapter [5 USCS §§ 7511 et seq.] to any position or group of positions excepted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter.

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5 U. S. C § 7512. Actions covered

This subchapter [5 USCS §§ 7511 et seq.] applies to –

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to –

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1215 or 7521 of this title.

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5 U. S. C. § 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter [5 USCS §§ 7511 et seq.] against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to –

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter [5 USCS §§ 7511 et seq.], together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

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5 U. S. C. § 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right –

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) (1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2) (A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless –

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii) (I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(2) With respect to an appeal from an adverse action covered by subchapter V of chapter 75 [5 USCS §§ 7541 et seq.], authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 [5 USCS §§ 7511 et seq.] with respect to which mitigation authority under this section exists.

(e) (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision –

(A) in the case of an action based on unacceptable performance described in section 4303 or a removal from the Senior Executive Service for failure to be recertified under section 3393a, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment –

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d) (1) In any case in which –

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office; the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e) (1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless –

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may –

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently, if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g) (1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final,

unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i) (1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

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5 U. S. C. § 7703. Judicial review of decisions of the Merit Systems Protection Board

(a) (1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b) (1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be –

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence; except that in the case of discrimination brought under any section is referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in

interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition in [sic] the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

Bieber, Bob

From: Bieber, Bob
Sent: Sunday, May 02, 1999 9:03 PM
To: Rezentes, Thomas
Cc: Spickelmier, Roger K. COL; Lowery, Ray; Bowen, Al; Carter, Eula K; Davoren, John; Harper, Dolores; Kenney, Chris CPT; Meinhardt, Michael; Murray, Marilyn; Peterson, Pete; Reeder, John; Scarlett, Tom; Schwemmer, Kent SFC; Springman, Susan K; Timmons, Tim; Varney, Robert; Wake, Fred H.
Subject: Guidance on Appropriate Dress for MVR BR Mgt Analysts in the Workplace.

Purpose. To obtain guidance on Appropriate Dress for MVR Branch members in the workplace. Tom, IAW CPAC Civilian Bulletin number 98-06 dated July 1998 page 2 (two), once again I ask the following question:

1) Is the wearing of hats, and/or jeans, and/or sneakers (added) and/or tee shirts and/or open toed sandals without socks appropriate for wear by management analysts in RDD, MVR BR in the workplace?

2) Or is the official guidance for MVR Br members still as received by Ray Lowery Memo For Record on 29 Sep 98. The essence of which states that the wearing of jeans, sneakers, or hats is not appropriate for MVR Br members in the workplace but it is permitted?

Please give your official new, expanded or reconfirmed guidance statement answer by written endorsement hereon this email message NLT close of business 11 May 99.

Background. You'll remember we had to have Mr. Lowery answer the question on 18 Sep 98 in step #2 of the grievance process because you declined to answer during step #1 on 15 Sep 98. You are probably wondering why I'm bringing this up again when I told both you and Mr. Lowery that I was resigned to management's position of guidance on this matter for MVR Br members – incongrous as it may be. Well here's why:

During the recent Arbitration process hearing held on 20 Apr 99 some interesting testimony was given and exhibits introduced. As you know, the Arbitration had absolutely nothing to do with appropriate dress. Arbitration was requested due to my seeking relief of the five day suspension without pay for alleged discourtesy, insubordination and refusal to obey management directives (2 Sep 98 no contact with F. Torres memo and the 16 Aug 98 R. Lowery "Gag" order memo). All charges were based on my sending the email message on 07 Sep 98 to Mr. Lowery with CF to MVR Br members; informing Mr. Lowery of my intent to file grievance seeking an answer to my question posed to him on 04 Aug 98. I claim to have been denied due process rights to a fair and orderly resolution without reprisal for my legitimate grievance and denied the opportunity to be apprised of the evidence of inappropriate conduct for which I was suspended. Well interestingly enough, although not a direct factor to the issue of the grievance, the subject of appropriate dress was addressed – quite at length – by each of mangement's supervisory witnesses to include yourself. Now that testimony causes me to believe that the 29 Sep 98 official guidance given by Mr. Lowery – confirming the inappropriateness of hats, jeans, and sneakers for wear by MVR Br members – is not correct at all. Those items plus the tee shirts and sandals

appear to be most appropriate for wear by Mgt Analysts in MVR Br. The governing criteria seems only to be "contact with the public." This position appears to be that of Col Spickelmier as well as MR. Lowery.

And a, theretofore, unseen and unknown by me, unsigned MFR dated 23 April 98 was introduced as an exhibit. It purports to be documenting my initial part III face to face discussion with supervisor (you) required by TAPES. Because you didn't surface this memo at the 01, 02, 14, or 15 Sep 98 meetings you had with me I am suspect it's existence at that time. In fact, if you had it then you certainly would have introduced it at the Step #1 grievance meeting (15 Sep 98) when you declined to answer "the question" again; forcing me to go to step #2 with Mr. Lowery. That is quite curious to me. Nevertheless, I noticed that the memo, although not addressing the appropriateness of any specific items of clothing or branch or type position occupied, per se, it did infer that the current items of clothing being worn by my "fellow employees" were deemed appropriate. The operative sentence in the memo is, "The management of RDD has determined the type and style of dress was acceptable." I assume that mgt of RDD means at least Col Spickelmier and most likely Mr. Lowery were the determiners. Now I'm not certain what items of clothing were being worn by my fellow RDD employees at that time. But I know that after my return all five of the aforementioned items certainly were. So I can't for the life of me understand why you declined to answer the "question" at step #1 of the grievance process. And even more puzzling is Mr. Lowery's answer and official guidance in the 29 Sep 98 MFR. So that's why I'm soliciting a new opportunity for you to issue guidance.

Also worthy of mention is that during the Arbitration hearing it was reconfirmed by CPAC (Ms. Jan Sifford) that the referenced and still current CPAC bulletin and statements are valid. "Employees are expected to comply with reasonable dress and grooming standards based on productivity, type of position. . . . etc." And, "Employees should seek guidance from their supervisor concerning attire appropriate in their workplace."

And you are now being informed that I affirmed at the Arbitration hearing that should those items or any other items not normally held as businesslike be deemed as appropriate by RDD MVR Br. members; "I will be the first to start wearing them." My conscience will then be clear. My fellow employees will know that my wearing such items would not be due to disrespect of them – which would be the case as long as they're deemed not appropriate. I am seeking out the standard – which all professionals do. This issue is about respect. It's all about respect. Respect for the institution, respect for the activity and respect for the people I work for and with. I do my best to show the appropriate respect and consideration for others and hope to receive the same treatment.

Conclusion. So here's what's happening. I'm again seeking guidance/confirmation on the appropriateness for wear of specific items of clothing by MVR Br members in the workplace. If I do not receive a usable, functioning answer by email endorsement heron [sic] by COB 11 May 99 I will initiate the allowable but still undesirable grievance process through AFGE. (This notice should preclude any gag orders preventing me from exercising the process again.)

Now the reasons for insisting on receiving the guidance in writing by email are three old [sic]. First, I have gone on record as identifying you as a liar in this issue and grievance process. I continue to hold and have affirmed that finding. Getting guidance on paper will hopefully neutralize that aspect from resurfacing. Here's an interesting aspect on that subject for you [sic] information: I learned at the Organizational Leadership for Executives Crse I attended in Mar that, "80% of an organization's problems can be traced to dishonesty." That's right – 80%. Second. As you know Mr. Ray Lowery does not hold to the existence of any absolutes. He has stated and confirmed this in writing at least twice. As such, should he again become involved in this issue, I want to head off any possibility of future capriciousness or whimsey playing into his guidance. This could manifest itself in the very distinct possibility of one being punished for wearing an item of clothing which was one day deemed by him as appropriate or permitted and then suddenly changing his stance and/or interpretation and then not advising anyone. And lastly, a lot of time and possible misunderstanding can be avoided on the part of myself and members of the MVR Br if we keep this issue out front and in writing. I remind you that in April 98 on my civilian evaluation support form you amended one of my major performance objectives/individual performance standards statement to include my maintaining a personal, positive relationship with Branch Members as well as USAAVNC, MACOM8, and HQDA, counterparts. This bullet is again on my support form for this rating period. As such, I believe it's in keeping with the letter and intent of that charge to keep each of them informed (save F. Torres of course) by CF of all the activity that takes place with this issue. Since you didn't find it necessary to define to me just what is meant

by "personal, positive relationship," you can't help but agree with me on this matter.

So there you have it. Hope to hear from you soon with information and in a fashion conducive to avoiding that undesirable grievance procedure.

Bob Bistline

CF:
AFGE (Aloha Combs)
CFAC (Jan Sifford)